

1 UNITED STATES DISTRICT COURT
2 FOR THE MIDDLE DISTRICT OF TENNESSEE
3 NASHVILLE DIVISION

4 BUD LEE, et al,)
5)
6 Plaintiffs,)
7 vs.) CASE NO. 3:06-0108
8)
9) JURY TRIAL
10) VOLUME 17
11 METROPOLITAN GOVERNMENT OF)
12 NASHVILLE AND DAVIDSON COUNTY,)
13 et al,)
14)
15 Defendants.)

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TRANSCRIPT OF PROCEEDINGS

BEFORE: THE HONORABLE ALETA A. TRAUGER
DATE: MAY 18, 2009
TIME: 9:00 A.M.

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1 THE COURT: Good morning. I hope everyone is
2 rested. They are the ones that need to be rested, however.

3 (Laughter.)

4 THE COURT: Okay. We're ready. We have the
5 Taser, and the batteries are out of it, right?

6 MS. BUSSELL: Yes, Your Honor.

7 (Jury enters.)

8 THE JURORS: Good morning.

9 THE COURT: I hope you are well rested. Has
10 everyone adhered to my instruction not to discuss the case
11 with anyone or amongst yourselves?

12 Has everyone adhered to my instruction not to do any
13 research connected to the case, and has everyone ignored any
14 publicity there might be?

15 (No negative responses.)

16 THE COURT: Very good. Members of the jury, now
17 that you have heard the evidence and the argument, it
18 becomes my duty to give you the instructions of the Court as
19 to the law applicable to this case. You will have
20 individual copies of these instructions in the jury room
21 with you.

22 It is your -- actually, let's pass out the copies now,
23 and they can follow along with me, and if you want to write
24 on them or underline as we go along.

25 Anybody object to that process? I have not done it

1 before, but it occurs to me it makes sense.

2 MR. BEDNARZ, SR.: No, Your Honor.

3 MR. AKERS: No, Your Honor.

4 MR. HARRIS: No, Your Honor.

5 MR. BROWN: No, Your Honor.

6 MS. BUSSELL: No, Your Honor.

7 THE COURT: It just occurs to me, it makes sense.

8 It is your duty, as jurors, to follow the law as I shall
9 state it to you and to apply that law to the facts as you
10 find them from the evidence in this case.

11 You are not to single out one instruction alone as
12 stating the law, but must *use the instructions as a whole.
13 Neither are you to be concerned with the wisdom of any rule
14 of law stated by me.

15 The lawyers may have referred to some of the
16 *government's rules of law in their arguments. If, however,
17 there is any difference between the law as stated by the
18 lawyers and that stated in these instructions, you are, of
19 course, to follow these instructions.

20 Nothing I say in these instructions is to be taken as
21 an indication that I have any opinion about the facts of the
22 case or what that opinion is. It is not my function to
23 determine the facts, but yours.

24 Now, some of you may have heard the terms "direct
25 evidence" and "circumstantial evidence."

1 Direct evidence is simply evidence like the testimony
2 of an eyewitness, which, if you believe it, directly proves
3 a fact. If a witness testified that he saw it raining
4 outside, and you believed him, that would be direct evidence
5 that it was raining.

6 Circumstantial evidence is simply a chain of
7 circumstances that indirectly proves a fact. If someone
8 walked into the courtroom wearing a raincoat covered with
9 drops of water and carrying a wet umbrella, that would be
10 circumstantial evidence from which you could conclude that
11 it was raining.

12 It is your job to decide how much weight to give the
13 direct and circumstantial evidence. The law makes no
14 distinction between the weight that you should give to
15 either one and does not say that one is any better evidence
16 than the other.

17 You should consider all the evidence, both direct and
18 circumstantial, and give it whatever weight you believe it
19 deserves.

20 Certain testimony has been read into evidence from a
21 deposition -- a deposition or viewed by video on the screen.

22 A deposition is testimony taken under oath before the
23 trial and preserved in writing. You are to consider that
24 testimony as if it had been given in court. This applies to
25 the witnesses who testified by deposition that were either

1 read with two readers or up on the screen.

2 Depositions were also used for impeachment purposes,
3 and I'm going to talk about that in just a minute, but this
4 instruction refers to where the witness testified by
5 deposition, on the screen, or with two people reading.

6 Certain charts and summaries have been shown to you in
7 order to help explain facts disclosed by books, records and
8 other documents. However, such charts or summaries are not,
9 in and of themselves, evidence or proof of any facts.

10 If such charts or summaries do not correctly reflect
11 facts or figures shown by the evidence in the case, you
12 should disregard them.

13 In other words, such charts or summaries are used only
14 as a matter of convenience, so if to the extent that you
15 find they are not in truth summaries of facts or figures
16 shown by the evidence in the case, you are to disregard them
17 entirely.

18 Evidence does not include several things that you have
19 heard in this courtroom. Evidence does not include any
20 statement of the attorneys during the trial, including their
21 closing arguments. You must decide for yourself whether you
22 believe the facts show what the attorneys have argued they
23 show.

24 Evidence does not include answers, statements or
25 comments made by the attorneys that I ordered stricken. You

1 are to treat anything that I ordered stricken as if you had
2 never heard it.

3 Finally, evidence does not include any objections
4 raised by the attorneys. You must not speculate why I
5 sustained or overruled any objection, nor are you permitted
6 to guess what the answer might have been to any question I
7 did not allow.

8 You may not draw any inference or speculate on the
9 truth of any suggestion included in a question that was not
10 answered.

11 During the course of the trial, I have admitted some
12 evidence for a limited purpose. For instance, the evidence
13 about drug use by the plaintiff being relevant to the
14 pecuniary value of his life -- of Patrick Smith, rather --
15 Patrick Lee being relevant to the pecuniary value of his
16 life, I think I gave you a limiting instruct at that time.

17 An exhibit or testimony can be admissible for one
18 purpose, but not for another. To the extent that it is
19 relevant, you may consider any such evidence only for the
20 purpose for which it was admitted, such as to show the
21 speaker's mental state or to establish that a complaint was
22 made. Such evidence should not be considered by you as
23 proof of the truthfulness of specific factual matters.

24 Another part of your job as jurors is to decide how
25 credible or believable each witness was. This is your job,

1 not mine. It is up to you to decide if a witness' testimony
2 was believable and how much weight you think it deserves.
3 You are free to believe everything that a witness said, or
4 only part of it, or none of it at all. But you should act
5 reasonably and carefully in making these decisions.

6 Let me suggest some things for you to consider in
7 evaluating each witness' testimony.

8 Ask yourself if the witness was able to clearly see or
9 hear the events. Sometimes even an honest witness may not
10 have been able to see or hear what was happening and may
11 make a mistake.

12 Ask yourself how good the witness' memory seemed to
13 be; did the witness seem able to accurately remember what
14 happened.

15 Ask yourself if there was anything else that may have
16 interfered with the witness' ability to perceive or remember
17 the events.

18 Ask yourself how the witness acted while testifying;
19 did the witness appear honest, or did the witness appear to
20 be lying.

21 Ask yourself if the witness had any relationship to
22 the plaintiffs or the defendants or anything to gain or lose
23 from the case that might influence that witness' testimony.

24 Ask yourself if the witness had any bias or prejudice
25 or reason for testifying that might cause the witness to lie

1 or to slant the testimony in favor of one side or the other.

2 And ask yourself how believable the witness' testimony
3 was, in light of all the other evidence; was the witness'
4 testimony supported or contradicted by other evidence that
5 you found believable.

6 If you believe that a witness' testimony was
7 contradicted by other evidence, remember that people
8 sometimes forget things, and that even two honest people who
9 witness the same event may not describe it exactly the same
10 way.

11 These are only some of the things that you may
12 consider in deciding how believable each witness was. You
13 may also consider other things that you think shed some
14 light on the witness' believability.

15 Use your common sense and your everyday experience in
16 dealing with other people, and then decide what testimony
17 you believe and how much weight you think it deserves.

18 Discrepancies in a witness' testimony or between his
19 or her testimony and that of others do not necessarily mean
20 that the witness should be discredited. Failure of
21 recollection is a common experience, and innocent mistakes
22 recalling certain facts are not uncommon.

23 Two persons witnessing the same incident or
24 transaction often will see or hear it differently, whether a
25 discrepancy pertains to a fact of importance or only to a

1 trivial detail considered in waiving it significance.

2 A witness may be discredited or impeached by
3 contradictory evidence or by evidence that at some other
4 time the witness has said or done something, or has failed
5 to say or do something, which is inconsistent with the
6 witness' present testimony here in court.

7 If you believe any witness has been impeached and,
8 thus, discredited, you may give the testimony of that
9 witness such credibility, if any, as you may think it
10 deserves.

11 If a witness is shown knowingly to have testified
12 falsely concerning any material matter, you have a right to
13 distrust that witness' testimony in other particulars, and
14 you may reject all of the testimony of that witness or give
15 it such credibility as you may think it deserves.

16 An act or omission is knowingly done if voluntarily
17 and intentionally, and not because of mistake or accident or
18 other innocent reason.

19 In reaching your verdict, you are to consider only the
20 evidence in this case. However, you are not required to set
21 aside your common sense. And you have the right to weigh
22 the evidence, in the light of your own observations and
23 experiences.

24 The party with the burden of proof on any given issue
25 has the burden of proving every disputed element of his or

1 her claim to you by a preponderance of the evidence.

2 If you conclude that the party bearing the burden of
3 proof has failed to establish his or her claim by a
4 preponderance of the evidence, you must decide against that
5 party on the issue you are considering.

6 What does a preponderance of the evidence mean. To
7 establish a fact by a preponderance of the evidence means to
8 prove that the fact is more likely true than not true.

9 In determining whether a claim has been proved by a
10 preponderance of the evidence, you may consider the relevant
11 testimony of all the witnesses, regardless of who may have
12 called them, and all the relevant exhibits received in
13 evidence, regardless of who may have produced them.

14 If you find that the credible evidence on a given
15 issue is evenly divided between the parties, that is, it is
16 equally probable that one side is right as it is that the
17 other side is right, then you must decide that issue against
18 the party having the burden of proof. That is because the
19 party bearing the burden must prove more than simple
20 equality of evidence.

21 On the other hand, the party with the burden of proof
22 need prove no more than a preponderance. So as long as you
23 find that the scales tip, however slightly in favor of the
24 party with this burden of proof, then that element will have
25 been proved by a preponderance of the evidence.

1 Some of you have heard of proof beyond a reasonable
2 doubt, which is proper standard of proof in a criminal
3 trial. That requirement does not apply to a civil case such
4 as this, and you should put it out of your mind.

5 All right. Title 42, United States Code Section 1983.
6 Plaintiffs Bud Lee and Cindy Lundman, as next friend and
7 natural parents of Patrick Lee, deceased, claim damages
8 alleged to have been sustained as the result of a
9 deprivation under color of state law of a right secured to
10 the decedent, Patrick Lee, by the fourth amendment of the
11 U.S. constitution, and by a federal statute protecting the
12 civil rights of all persons within the United States.

13 Specifically, the plaintiffs allege that the defendant
14 police officers subjected Patrick Lee to deprivation of
15 rights and privileges secured and protected by the
16 constitution and the laws of the United States, namely the
17 constitutional right to be free from the excessive use of
18 force against him during the course of an arrest.

19 Defendant police officers deny that any of their
20 actions during the time in question violated Patrick Lee's
21 constitutional rights. Defendant police officers state that
22 they were acting in good faith and with probable cause and
23 that their actions were reasonable.

24 Defendant police officers further claim that they were
25 not guilty of any fault or wrongdoing in regard the incident

1 sued upon.

2 In order to prove plaintiffs' claim, the burden is
3 upon the plaintiffs, Bud Lee and Cindy Lundman, as next
4 friend and natural parents of Patrick Lee, deceased, to
5 establish by a preponderance of the evidence each of the
6 following elements.

7 First, that defendant police officers performed acts
8 that operated to deprive the decedent, Patrick Lee, of one
9 or more of his federal constitutional rights, as defined and
10 explained in these instructions, by using excessive force
11 against him during the course of his arrest.

12 Second, that the defendant police officers, then and
13 there, acted under color of state law.

14 And, third, that the defendant police officers' acts
15 were the proximate cause of damages sustained by Patrick
16 Lee.

17 Because the defendant police officers were officials
18 of the Metropolitan Nashville Police Department at the time
19 of the act in question, their acts -- they were acting under
20 color of state law.

21 I instruct you to that effect. In other words, the
22 second requirement has been satisfied, and you do not need
23 to deliberate on that second element.

24 Causation. An injury or damage is proximately caused
25 by an act or failure to act whenever it appears from the

1 evidence in the case that the act or omission played a
2 substantial part in bringing about or actually causing the
3 injury or damage to Patrick Lee, and that the injury or
4 damage was either a direct result or a reasonably probable
5 consequence of the act or omission.

6 The plaintiffs have the burden of proving each and
7 every element of their claims by a preponderance. If you
8 find that the plaintiffs have not proved any one of the
9 elements against a police officer defendant by a
10 preponderance of the evidence, then you must return a
11 verdict in favor of that defendant police officers.

12 Excessive force. Plaintiffs Bud Lee and Cindy
13 Lundman, as next friend and natural parents of Patrick Lee,
14 deceased, claim that the defendant police officers used
15 excessive force when they arrested Patrick Lee.

16 In making a lawful arrest, a law enforcement officer
17 has the right to use such force as is necessary under the
18 circumstances to effect the arrest. Whether or not the
19 force used in making an arrest was unreasonable is a
20 question to be determined by you, in light of all the
21 evidence received in the case.

22 You must determine the degree of force that a
23 reasonable and prudent police officer would have applied in
24 effecting the arrest, under the circumstances shown from the
25 evidence received in this case.

1 In determining whether any of the defendant police
2 officers used excessive force, you may consider, one, the
3 extent of the injury suffered; two, the need for the
4 application of force; three, the relationship between the
5 need and the amount of force used; four, the threat
6 reasonably perceived by the individual officer; and, five,
7 any efforts made to temper the severity of a forceful
8 response.

9 Injuries which result from, for example, an officer's
10 use of force to overcome resistance to arrest do not involve
11 constitutionally protected interests. An officer's use of
12 excessive force does not give constitutional protection
13 against injuries that would have occurred, absent the
14 excessive force.

15 The reasonableness of a particular use of force must
16 be judged from the perspective of a reasonable officer on
17 the scene, rather than with hindsight.

18 The nature of reasonableness must allow for the fact
19 that police officers are often forced to make split-second
20 judgments under circumstances that are tense, uncertain, and
21 rapidly evolving, about the amount of force that is
22 necessary in a particular situation.

23 This reasonableness inquiry is an objective one. The
24 question is whether the defendant police officers' actions
25 are objectively reasonable, in light of the facts and

1 circumstances confronting them, without regard to their
2 underlying intent or motivation.

3 In this case, the defendant police officers did not
4 act in unison, and you must consider separately the actions
5 of each of them. Thus, you may find liability by none of
6 them or all of them or any of them individually.

7 Now, municipal liability of Metropolitan Nashville
8 government. Plaintiffs also claim that defendant
9 Metropolitan Government of Nashville and Davidson County,
10 Metro, a municipality, is liable to them for the denial of
11 Patrick Lee's constitutional rights.

12 Defendant Metro may be liable where you find that
13 Patrick Lee has been deprived of his constitutional rights
14 and that such deprivation was done pursuant to a
15 governmental custom, policy ordinance, regulation or
16 decision.

17 When a person is injured as the proximate result of a
18 government's policy, custom, regulation or decision made by
19 those officials whose statements or acts may fairly be said
20 to represent official policy, defendant Metro itself is
21 responsible for the injury that is caused.

22 Defendant Metro maybe liable to the plaintiffs here if
23 you find that the deprivation was done pursuant to a custom,
24 policy, ordinance, regulation or decision of defendant Metro
25 that was the proximate cause of the deprivation of Patrick

1 Lee's constitutional rights. Whether a custom or policy
2 exists is a question of fact for you to determine.

3 Please refer to the earlier causation instruction for
4 a definition of "proximate cause."

5 Now, here are the elements of the failure to train
6 claim against Metro.

7 Plaintiffs claim that Patrick Lee was injured as a
8 result of defendant Metro Government's failure to properly
9 train its officers, and that this alleged failure can be
10 considered to be the official policy of defendant
11 Metropolitan Government.

12 Your verdict will be for the plaintiffs and against
13 defendant Metro only if you find that one or more defendant
14 police officers deprived Patrick Lee of a constitutional
15 right by use of excessive force and if you find the
16 following.

17 First, that defendant Metro's training program was
18 inadequate to train its officers to carry out their duties;
19 second, that the need for more or different training is so
20 obvious and the inadequacies so likely to result in the
21 violation of constitutional rights, that the policy-makers
22 of defendant Metro can reasonably be said to have been
23 deliberately indifferent to the need for such training; and,
24 third, that the failure of defendant Metropolitan Government
25 to properly train was a cause of injury to Patrick Lee.

1 Plaintiffs cannot establish liability against
2 defendant Metro simply by showing that an injury or accident
3 could have been avoided if an officer had better or more
4 training sufficient to equip him to avoid the particular
5 injury-causing conduct.

6 Such a claim could be made about almost any encounter
7 resulting in injury. The question is whether the training
8 program at issue is adequate to enable officers to respond
9 properly to the usual and recurring situations with which
10 they must deal.

11 Adequately trained officers occasionally make
12 mistakes. The fact that they do says little about the
13 training program or the legal basis for holding the City
14 liable.

15 Deliberate indifference to the rights of others is the
16 conscious or reckless disregard of the consequences of one's
17 act or omissions. Deliberate indifference requires more
18 than negligence or ordinary lack of due care.

19 If you find for the plaintiffs, Bud Lee and Cindy
20 Lundman as next friend and natural parents of Patrick Lee,
21 deceased, you must determine the plaintiffs' damages.

22 The plaintiffs have the burden of proving damages by a
23 preponderance of the evidence. Damages means the amount of
24 money that will reasonably and fairly compensate the
25 plaintiffs, Bud Lee and Cindy Lundman, as next friend and as

1 natural parents of Patrick Lee, deceased, for the
2 deprivation of civil rights proximately caused by the
3 defendant police officers.

4 Damages may not be based on speculation or sympathy.
5 They must be based on the evidence presented at trial and
6 only on that evidence.

7 You should consider the following element of damage to
8 the extent you find them proved by a preponderance of the
9 evidence and no others.

10 One, the pecuniary value of Patrick Lee's life; two,
11 the reasonable cost of Patrick Lee's medical care and
12 hospitalization; three, Patrick Lee's physical or emotional
13 pain and mental anguish; and four, punitive damages, if any.

14 If you find for the plaintiffs, but you find that the
15 plaintiffs have failed to prove actual damages, you shall
16 return an award of nominal damages, not to exceed one
17 dollar. The mere fact a constitutional deprivation has been
18 shown to have occurred is an injury to the person entitled
19 to enjoy that right, even when actual damages do not flow
20 from the deprivation.

21 In determining the pecuniary value of the life of
22 Patrick Lee, you should take into consideration the
23 following factors.

24 One, the age of Patrick Lee; two, the condition of
25 health of Patrick Lee; three, the life expectancy of Patrick

1 Lee; four, the strength and capacity of Patrick Lee for work
2 and for earning money through skill in any art, trade,
3 profession, occupation or business; five, the personal
4 habits of Patrick Lee as to sobriety and industry; and, six,
5 the reasonable value of the loss of consortium suffered by
6 the parents of the deceased, Bud Lee and Cindy Lundman.

7 "Consortium" is a legal term, consisting of several
8 elements. It includes tangible services provided by a
9 family member, as well as intangible benefits each family
10 member receives from the continued existence of other family
11 members.

12 Such tangible benefits include love, affection,
13 attention, care, protection, companionship and cooperation
14 that the parents would reasonably be certain to have
15 received during the life of the deceased.

16 In determining whether to award damages for the loss
17 of consortium for the death of a child, you should consider
18 the age of the deceased child and the parent closeness of
19 the relationship, dependence, and any other factors that
20 reflect upon the relationship between the deceased and the
21 parent.

22 In weighing these factors, you should consider the
23 fact that expectancy of life is, at most, a probability
24 based upon experience and statisticians. You should be
25 mindful of the possibility that the earnings of an

1 individual are not always uniform or over a period of time.

2 You should consider not only the most optimistic
3 expectations of the future, but also the most pessimistic,
4 and all the uncertainties between the extremes.

5 Finally, when determining the amount of damages based
6 upon life expectancy and earning capacity, you should deduct
7 the present cash value of the deceased's living expenses,
8 had he lived.

9 These living expenses are those that, under the
10 deceased's standard of living, would have been reasonably
11 necessary to keep the deceased in such a condition of health
12 and well-being as to maintain the capacity to earn money.

13 In addition to the damages mentioned in other
14 instructions, the law permits the jury, under certain
15 circumstances, to award the injured person punitive damages
16 in order to punish a defendant for some extraordinary
17 misconduct and to serve as an example or warning to others
18 not to engage in such conduct.

19 If you find in favor of the plaintiffs and against a
20 defendant police officer, then in addition to any other
21 damages to which you find the plaintiff entitled, you may,
22 but are not required, to award plaintiffs an additional
23 amount as punitive damages, if you find it is appropriate to
24 punish a defendant police officer or deter defendant police
25 officers and others from like conduct in the future.

1 Whether to award plaintiffs punitive damages is a
2 matter within your sound discretion. You may assess
3 punitive damages against an individual police officer
4 defendant for a fourth amendment violation only if the
5 plaintiffs prove, by a preponderance of the evidence, that
6 the officers' conduct involved evil motive or intent or was
7 reckless or callously indifferent to Patrick Lee's
8 constitutional rights.

9 Punitive damages may not be assessed against the
10 Metropolitan Government.

11 The law forbids you to determine any issue in this
12 case by chance. Thus, if you decide that a party is
13 entitled to recover, you must not arrive at the amount of
14 damages to be awarded by agreeing in advance to take each
15 juror's independent estimate of the amount to be awarded to
16 total those amounts, to divide the total by the number of
17 jurors, and make that resulting average the amount you
18 award. That's called a quotient verdict, and it's not
19 permitted.

20 The Court has given you instructions embodying various
21 rules of law to help guide you to a just and lawful verdict.
22 Whether some of these instructions will apply will depend
23 upon what you find to be the fact. That I have instructed
24 you on various subjects in this case, including that of
25 damages, must not be taken as indicating an opinion of the

1 Court on what you should find the facts to be or on which
2 party is entitled to your verdict.

3 The attitude and conduct of jurors at the beginning of
4 their deliberations is very important. It is rarely
5 productive or good for a juror, upon entering the jury room,
6 to make an emphatic expression of his or her opinion on the
7 case, or to announce a determination to stand for a certain
8 verdict.

9 When a juror does that, his or her sense of pride may
10 be aroused, and that person may hesitate to recede from an
11 announced position if shown that it is wrong. Remember, you
12 are not partisans or advocates. You are judges of the
13 facts.

14 Sympathy or prejudice must not enter into your
15 deliberation as jurors, no matter what your sympathy or
16 prejudice may lead you to think. Sympathy or prejudice has
17 no place in the trial of a lawsuit, or in the making up of
18 your minds as to what your verdict shall be. Do not permit
19 any such emotional considerations to enter into your
20 deliberations at all.

21 The law demands of you a just verdict unaffected by
22 anything, except the evidence, your common sense, and the
23 law as the court gives it to you.

24 Some of you, most of you, have taken notes during the
25 trial. Once you retire to the jury room, you may refer to

1 your notes, but only to refresh your own memory.

2 Your notes are not evidence. You may not read your
3 notes of your fellow jurors or otherwise inform them of what
4 you have written. The notes may contain errors, or they may
5 be misunderstood or taken out of context.

6 The notes may only pertain to part of the testimony,
7 and may not be an exact account of what was said by a
8 witness.

9 You are free to discuss the testimony of the witnesses
10 with your fellow jurors, but each juror must rely on his or
11 her own memory as to what the witness did or did not say.

12 Upon retiring to the jury room, you will select one of
13 your number to act as your foreperson. The foreperson will
14 preside over your deliberations and will be your
15 spokesperson here in court.

16 We have prepared a verdict form for your convenience,
17 which I will go over in just a minute.

18 You will take this form to the jury room, and when you
19 have reached unanimous agreement as to your verdict, you
20 will have the foreperson fill in the date and sign the form
21 which sets forth the verdict upon which you unanimously
22 agree. You will then return with your verdict to the
23 courtroom.

24 It is proper to add the caution that nothing said in
25 these instructions and nothing in any form of verdict

1 prepared for your convenience is meant to suggest or convey
2 in any way or manner any intimation as to what verdict I
3 think you should find. What the verdict shall be is your
4 sole and exclusive duty and responsibility.

5 The verdict must represent the considered judgment of
6 each juror. In order to return a verdict, it is necessary
7 that each juror agree. Your verdict must be unanimous.

8 It is your duty as jurors to consult with one another
9 and to deliberate, with a view to reaching an agreement, if
10 you can do so without violence to individual judgment.

11 You must each decide the case for yourself, but only
12 after an impartial consideration of the evidence in the case
13 with your fellow jurors.

14 In the course of your deliberations, do not hesitate
15 to reexamine your own views and change your opinion, if
16 convinced it is in error. But do not surrender your honest
17 conviction as to the weight or effect of evidence solely
18 because of the opinion of your fellow jurors or for the mere
19 purpose of returning a verdict.

20 Remember at all times that you are not partisans. You
21 are judges, judges of the facts. Your sole interest is to
22 seek the truth from the evidence in the case.

23 If it becomes necessary during your deliberations to
24 communicate with the Court, you may send a note by the court
25 security officer, signed by your foreperson or by one or

1 more members of the jury.

2 No member of the jury should even attempt to
3 communicate with the Court by any means, other than signed
4 writing. And the Court will never communicate with any
5 member of the jury on any subject touching the merits of the
6 case, except in writing or orally here in open court.

7 Bear in mind, also, that you are never to reveal to
8 any person, not even to the Court, how you stand numerically
9 or otherwise on the questions before you until after you
10 have reached a unanimous verdict.

11 Now, the verdict form will walk you right through the
12 questions you must answer.

13 With regard to each of the three officers, you are
14 asked these questions. "Did, for instance, defendant
15 Jonathan Mays, violate Patrick Lee's fourth amendment
16 constitutional right to be free from the use of excessive
17 force? Yes or no."

18 If you answer no to that question, you move on to the
19 next officer. If you answer yes, then you answer this
20 series of questions.

21 Please state the amount of compensatory or nominal
22 damages you assess against Defendant Mays; then, do you
23 award punitive damages against Defendant Mays; then, if so,
24 state the amount of punitive damages; and, then, do you find
25 that Officer Mays use of excessive force on Patrick Lee was

1 closely related to or was caused by a custom, policy or
2 practice of the Metropolitan Government in failing to train
3 its officers.

4 So that's the series of questions you answer for each
5 of the three officer defendants.

6 And then with regard to the Metro Government, you must
7 find the use of excessive force by one or more of the
8 officers. If you find that none of the officers used
9 excessive force, then Metropolitan Government is not liable
10 on the failure to train form -- claim. But if you find at
11 least one officer liable on the excessive force claim, then
12 you will answer the last question, question 4, which deals
13 with Metro Government, and you are to state the amount of
14 compensatory or nominal damages that you assess against
15 Metro on the failure to train claim.

16 So that's the verdict form. You will have that back
17 in the jury room with you with all of the evidence.

18 I would like the lawyers to approach the bench for one
19 minute.

20 *(Bench conference.)

21 THE COURT: I don't have -- *it escaped us, but
22 we haven't given them an instruction on expert witnesses,
23 which given -- given the plethora of expert witnesses, I
24 sort of think we need to do. And if you all don't think --
25 if you all agree we don't need one, I won't give one, but I

1 think it might be helpful to them.

2 What do you think?

3 MR. BEDNARZ, SR.: I think so, Your Honor.

4 MS. OLIVER: Your Honor, may I bring one thing
5 up?

6 THE COURT: Yes, please.

7 MS. OLIVER: Certain things were left out of Your
8 Honor's oral reading of the version I had.

9 THE COURT: I realized when I got -- I found the
10 battery instruction in here that I didn't have -- I was
11 reading from the one that still had battery in it. What did
12 I miss?

13 MS. OLIVER: With regard to our issues --

14 THE COURT: What page?

15 MS. OLIVER: Page 21. I don't have a draft in
16 front of me.

17 THE COURT: Yes. Okay.

18 MS. OLIVER: Starting with, "That a particular
19 officer."

20 THE COURT: Yes. Is that the only thing?
21 Anybody catch anything.

22 MR. BROWN: I did, Judge. The part I circled
23 there on excessive force, page 17. This was something that
24 Your Honor had added in your writing or somebody's writing.
25 And I believe Your Honor just said that the extent of

1 injuries suffered -- anything else?

2 THE COURT: I am so sorry.

3 MR. BROWN: That's okay. Then this whole
4 paragraph here, which is --

5 THE COURT: 18? What page?

6 MR. BROWN: Page 18.

7 THE COURT: 18. I pared down the part --

8 MR. BROWN: Yes, ma'am, that whole paragraph.

9 THE COURT: All right, 17, 18 and 21, all right.
10 Anything else? Anything on Patrick Lee?

11 All right. Let me find the -- I think we have got a
12 pattern in the Sixth Circuit Criminal -- let's see.

13 Here's the pattern, Sixth Circuit. You have heard
14 testimony of several expert witnesses. An expert witness
15 has special knowledge or experience that allows the witness
16 to give an opinion.

17 You do not have to accept an expert's opinion. In
18 deciding how much weight to give it, you should consider the
19 witness's qualifications and how he reached his conclusion.
20 Remember that you alone decide how much of a witness's
21 testimony to believe and how much weight it deserves.

22 Is that okay?

23 MR. BEDNARZ, SR.: Yes, ma'am.

24 MS. OLIVER: (Moves head up and down.)

25 MS. BUSSELL: (Moves head up and down.)

1 THE COURT: Should we type this up and send it
2 back or have them rely on their memories?

3 MS. OLIVER: I'm fine with it.

4 MR. BEDNARZ, SR.: I think it should go with
5 them.

6 THE COURT: All right.

7 MR. BROWN: May I inquire which version the jury
8 has of this?

9 THE COURT: They have the correct one. They have
10 the correct one because I had her -- I will confirm that.

11 MR. BROWN: Okay. Thank you.

12 THE COURT: Okay. I have to say I have never
13 done that before. I apologize to you.

14 (Bench conference concludes.)

15 THE COURT: All right. Members of the jury, the
16 Court has made a mistake, and I want to make sure that -- I
17 need to read to you some paragraphs which I left out. I
18 want to make sure they are in your copy.

19 Would you turn to page 17? And the listing of the
20 elements there, does yours say, "To the extent of the
21 injuries suffered at the hand of the particular defendant
22 police officer"?

23 THE JURORS: (Move heads up and down.)

24 THE COURT: Does it?

25 THE JURORS: (Move heads up and down.)

1 THE COURT: Great. Okay. Does somebody not --
2 you have it? Everyone got that? All right.

3 All right. I'm going to read you two or three
4 sections here that were to be in here. You have the right
5 draft and you probably noticed, if you were following, that
6 I didn't read a few parts of this. And that's because I was
7 working from the penultimate draft rather than the very last
8 draft.

9 So on page 17, the first element, the extent of the
10 injuries suffered at the hand of the particular defendant
11 police officer.

12 Turn to page 18. The paragraph that starts -- it's
13 the second-to-last paragraph. I'm going to read it to you.
14 "Liability on the part of one or more of the police officers
15 in this case, if any, must be based on a misuse of power and
16 not on the accidental effects of otherwise lawful conduct.
17 A police officer is not required to choose the least
18 intrusive means of applying force in making an arrest."

19 Then if you will turn to page 21. There is an
20 additional section I need to read to you. "That a
21 particular officer may be unsatisfactorily trained will not
22 alone suffice to fasten liability on the City, because a
23 particular officer's shortcomings may have resulted from
24 factors other than a faulty training program. For example,
25 an otherwise sound training program has occasionally been

1 negligently administered and liability against the
2 Metropolitan Government under Section 1983 will not lie
3 under such circumstances."

4 And then, members of the jury, we realized that we did
5 not give you an instruction on expert witnesses. I'm going
6 to read it to you, and I will be sending back copies of this
7 instruction.

8 "You have heard the testimony of many expert witnesses
9 in this case. An expert witness has special knowledge or
10 experience that allows the witness to give an opinion. You
11 do not have to accept an expert's opinion.

12 In deciding how much weight to give it, you should
13 consider the witness' qualifications and how he reached his
14 conclusions. Remember that you alone decide how much of a
15 witness' testimony to believe and how much weight it
16 deserves."

17 And for the record, I'm going to state that the jury
18 has the correct version of instructions. They had the
19 correction version of instructions before them as the Court
20 was reading and made a few omissions.

21 At this time, members of the jury, you may take back
22 with you everything you have with you, your notes, whatever
23 exhibit notebooks you have, the instructions.

24 We will send back the verdict form. We will send back
25 all of the evidence. You will have in the jury room a DVD

1 player, some way for you to look at any of these various
2 videotapes that you may wish to look at.

3 And at this time, you are excused to begin your
4 deliberations.

5 Some of you didn't get the last binder? Oh, okay.

6 (Jury exits at 9:52 A.M.)

7 THE COURT: Again, my apologies. I wish someone
8 had given me the high sign when I made the first omission,
9 but I know you don't like to interrupt judges giving
10 instructions. But, okay, anyway, we'll get this typed up.
11 I'll give you copies, and we'll send several copies back to
12 the jury room.

13 Anybody else want to say anything else for purposes of
14 the record?

15 All right. We're in recess.

16 MR. BEDNARZ, SR.: Judge, could I ask a question,
17 please?

18 THE COURT: Yes.

19 MR. BEDNARZ, SR.: What's Your Honor's policy on
20 whether or not all of the lawyers have to hang around or be
21 within a certain --

22 THE COURT: I want you within calling distance.
23 The -- depends on the case, but I want you to be able get
24 here within 10, 15 minutes, max, if we have a question. So
25 just make sure that Ms. Briggs-Jones can reach you.

1 MR. BEDNARZ, SR.: Yes. Okay. Very good. Thank
2 you, Your Honor.

3 (Reassembled at 7:30 p.m.)

4 THE COURT: They have reached a verdict. The
5 pizzas aren't even here yet, but they have reached a
6 verdict, so bring them in, please.

7 You apparently had a quicker source than we did. I
8 hope you got to eat your food.

9 (Jury enters.)

10 THE COURT: I'm sorry you had to starve to death.
11 The pizza is still apparently on its way.

12 You have reached a verdict?

13 THE FOREPERSON: Yes.

14 THE COURT: Would you hand the verdict form to
15 the court security officer, Mr. Rondo? Thank you. Thank
16 you.

17 All right. With regard to question one, "Did
18 Defendant Officer Jonathan Mays violate Patrick Lee's fourth
19 amendment constitutional right to be free from excessive
20 force?" Answer is no.

21 With regard to Officer Jamie Scruggs, the answer to
22 question 2 is no excessive force.

23 The answer to number 3, Jason Cregan, the answer is no
24 to excessive force.

25 And, therefore, they did not answer the question, the

1 last question.

2 (POLLING OF JURY CONTAINED IN SEPARATE SEALED VOLUME

3 18.)

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